

Letter of Findings: 04-20100498; 09-20100499; 10-20100500
Gross Retail Tax, County Innkeeper Tax, Food and Beverage Tax
For the Years 2008 and 2009

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ISSUES

I. Hotel Accommodations – Innkeepers' Tax/Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-4; IC § 6-2.5-5-25; IC § 6-8.1-3-3(b); IC § 6-8.1-5-1(c); IC § 6-9-8-2; IC § 6-9-8-2(c); Mynsberge v. Dep't of State Revenue, 716 N.E.2d 629 (Ind. Tax Ct. 1999); Tri-States Double Cola Bottling Co. v. Dep't of State Revenue, 706 N.E.2d 282 (Ind. Tax Ct. 1999); Indiana Dept. of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); [45 IAC 2.2-5-55](#)(b)(3); Sales Tax Information Bulletin 10 (June 2008); Sales Tax Information Bulletin 10 (June 2004); Sales Tax Information Bulletin 10 (June 2002); Letter of Findings 04-20091028 (April 29, 2010); Letter of Findings 04-20090967 (April 29, 2010); Letter of Findings 04-20060286 (December 18, 2006).

Taxpayer argues that it was not subject to Gross Retail (Sales) or Innkeepers' Tax on the sale of hotel accommodations to not-for-profit entities.

II. Meeting Rooms – Food and Beverage/Gross Retail Tax.

Authority: [IC 6-2.5-2-1](#); IC § 6-2.5-5-25

Taxpayer maintains that it was not required to pay or collect sales tax or Innkeepers' Tax on the price it charged customers for the rental of hotel meeting rooms.

III. Government Agencies – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(c); Sales Tax Information Bulletin 4 (May 2010).

Taxpayer claims that it was not required to collect sales tax when it rented hotel accommodations to federal government agencies.

IV. Additional Room Charges – Innkeepers' Tax/Gross Retail Tax.

Authority: IC § 6-2.5-4-4; IC § 6-2.5-9-3; IC § 6-8.1-5-1(c); Greensburg Motel Associates, LP v. Indiana Dep't of State Revenue, 629 N.E.2d 1302 (Ind. Tax Ct. 1994); [45 IAC 2.2-4-8](#); [45 IAC 2.2-4-8](#)(e); Sales Tax Information Bulletin 41 (September 2010).

Taxpayer argues that it was not required to collect sales tax when it charged its customers for various additional room charges.

V. Catered Meals – Food and Beverage Tax.

Authority: IC § 6-2.5-5-25; IC § 6-9-12; IC § 6-9-12-3(a); IC § 6-9-12-4; Sales Tax Information Bulletin 10 (June 2008).

Taxpayer states that it was not subject to Food and Beverage Tax on the price paid by not-for-profit organizations for catered meals.

VI. Miscellaneous Income – Gross Retail/Food and Beverage Tax.

Authority: IC § 6-2.5-2; IC § 6-2.5-2-1; IC § 6-2.5-6-10; IC § 6-8.1-5-1(c); IC § 6-9-12-4; Sales Tax Information Bulletin 7 (October 2010).

Taxpayer argues that the audit included as subject to sales tax money which constituted a "credit" for timely filing sales tax returns; Taxpayer maintains that money which Taxpayer received as a gratuity is not subject to Food and Beverage Tax.

STATEMENT OF FACTS

Taxpayer operates an approximately 500 room hotel located in Indiana. Within the hotel, Taxpayer operates a restaurant, lounge, "business center," and gift shop. Taxpayer provides meeting, convention, catering, and banquet facilities. Taxpayer also rents audio visual equipment to its customers.

The Department of Revenue (Department) conducted an audit review of Taxpayer's business records. As a result of that audit, the Department issued proposed notices of additional Gross Retail (sales) tax, County Innkeepers' Tax, and Food & Beverage Tax. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

I. Hotel Accommodations – Innkeepers' Tax/Gross Retail Tax.

DISCUSSION

Taxpayer maintains that it was not required to collect sales or Innkeepers' Tax from organizations which presented Taxpayer an exemption certificate when the organizations rented individual guest rooms. Taxpayer

argues that it was not required to collect sales tax or Innkeepers' Tax from organizations which presented Taxpayer an exemption certificate when the organization purchased prepared meals on behalf of the organization's members and guests.

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states as follows:

An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana. (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The sales tax is imposed on certain rental transactions including the rental of hotel rooms. IC § 6-2.5-4-4 states:

(a) A person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations, such as booths, display spaces, banquet facilities, and cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person:

(1) if those rooms, lodgings, or accommodations are rented or furnished for periods of less than thirty (30) days; and

(2) if the rooms, lodgings, and accommodations are located in a hotel, motel, inn, tourist camp, tourist cabin, gymnasium, hall, coliseum, or other place, where rooms, lodgings, or accommodations are regularly furnished for consideration.

(b) Each rental or furnishing by a retail merchant under subsection (a) is a separate unitary transaction regardless of whether consideration is paid to an independent contractor or directly to the retail merchant.

(c) For purposes of this section, "consideration" includes a membership fee charged to a customer.

(d) Notwithstanding subsection (a), a person is not a retail merchant making a retail transaction if:

(1) the person is a promoter that rents a booth or display space to an exhibitor; and

(2) the booth or display space is located in a facility that:

(A) is described in subsection (a)(2); and

(B) is operated by a political subdivision (including a capital improvement board established under [IC 36-10-8](#) or [IC 36-10-9](#)) or the state fair commission.

This subsection does not exempt from the state gross retail tax the renting of accommodations by a political subdivision or the state fair commission to a promoter or an exhibitor.

In addition to the state-level sales Tax, Marion County also imposes an "Innkeepers' Tax" on hotel accommodations. IC § 6-9-8-2 states as follows:

(a) Each year a tax shall be levied on every person engaged in the business of renting or furnishing, for periods of less than thirty (30) days, any lodgings in any hotel, motel, inn, tourist camp, tourist cabin, or any other place in which lodgings are regularly furnished for a consideration.

(b) This tax shall be in addition to the state gross retail tax and use tax imposed on such persons by [IC 6-2.5](#). The county fiscal body may adopt an ordinance to require that the tax be reported on forms approved by the county treasurer and that the tax shall be paid monthly to the county treasurer. If such an ordinance is adopted, the tax shall be paid to the county treasurer not more than twenty (20) days after the end of the month the tax is collected. If such an ordinance is not adopted, the tax shall be imposed, paid, and collected in exactly the same manner as the state gross retail tax is imposed, paid, and collected under [IC 6-2.5](#).

(c) All of the provisions of [IC 6-2.5](#) relating to rights, duties, liabilities, procedures, penalties, definitions, exemptions, and administration shall be applicable to the imposition and administration of the tax imposed by this section except to the extent such provisions are in conflict or inconsistent with the specific provisions of this chapter or the requirements of the county treasurer. Specifically, and not in limitation of the foregoing sentence, the terms "person" and "gross income" shall have the same meaning in this section as they have in [IC 6-2.5](#).

(d) If the tax is paid to the department of state revenue, the returns to be filed for the payment of the tax under this section may be either a separate return or may be combined with the return filed for the payment of the state gross retail tax as the department of state revenue may determine by rule. (e) If the tax is paid to the department of state revenue, the amounts received from this tax shall be paid monthly by the treasurer of state to the treasurer of the capital improvement board of managers of the county upon warrants issued by the auditor of state.

The Marion County Innkeepers' Tax incorporates the "rights, duties, liabilities, procedures, penalties, definitions, exemptions" and administrative procedures set out in IC § 6-2.5. IC § 6-9-8-2(c). In other words, if a transaction is exempt for sales tax purposes, it is exempt for purposes of determining the Innkeepers' Tax.

Taxpayer points to the exemption set out in IC § 6-2.5-5-25 stating that it collected from its customers "numerous exemption certificates" and that the transactions related to the customers presenting those exemption certificates are not subject to either sales tax or the Innkeepers' Tax. The cited exemption states that:

(a) Transactions involving tangible personal property or service are exempt from the state gross retail tax, if the person acquiring the property or service:

(1) is an organization described in section 21(b)(1) of this chapter;

- (2) primarily uses the property or service to carry on or to raise money to carry on its not-for-profit purpose; and
 - (3) is not an organization operated predominantly for social purposes.
- (b) Transactions occurring after December 31, 1976, and involving tangible personal property or service are exempt from the state gross retail tax, if the person acquiring the property or service:
- (1) is a fraternity, sorority, or student cooperative housing organization described in section 21(b)(1)(A) of this chapter; and
 - (2) uses the property or service to carry on its ordinary and usual activities and operations as a fraternity, sorority, or student cooperative housing organization.

However, it is the Department's stated position that hotel accommodations rented for the private benefit of the recipient are outside the purview of the not-for-profit exemption. Sales Tax Information Bulletin 10 (June 2008), 20080702 Ind. Reg. 045080515NRA, states:

For a purchase by a nonprofit organization to qualify for exemption, the article purchased must be used for the same purpose as that for which the organization is being exempted. Purchases for the private benefit of any member of the organization or for individuals, such as meals and lodgings, are not eligible for exemption. See also Sales Tax Information Bulletin 10 (July 2004) (27 Ind. Reg. 3385). "Purchases for the private benefit of any member of the organization or for individuals such as meals and lodgings are not eligible for exemption." (Emphasis added); Sales Tax Information Bulletin 10 (June 2002) (25 Ind. Reg. 3936) "Purchases for the private benefit of any member of the organization or for any other individual, such as meals or lodgings, are not eligible for exemption."

Taxpayer cites to Letter of Findings 04-20060286 (December 18, 2006) addressing the imposition of sales tax on transactions which occurred during 2003 and 2004. That Letter of Findings states that, "[T]he taxpayer received exemption certificates from the non-profit members and is thus relieved from the liability for failure to collect." Nonetheless, the Department's "General Sales Tax Exemption Certificate," (ST-105) since August 2005 has specifically stated that the exemption applies to "Sales to nonprofit organizations claiming exemption pursuant to Sales Tax Information Bulletin [] 10" but that the exemption may "not be used for personal hotel rooms and meals."

It is the Taxpayer's position that it collected the exemption certificates in good faith and that it should not now be penalized if the Department has changed its position as reflected in the Information Bulletin. Taxpayer relies on IC § 6-8.1-3-3(b) which states as follows:

No change in the department's interpretation of a listed tax may take effect before the date the change if (1) adopted in a rule under this section; or (2) published in the Indiana Register under [IC 4-22-7-7\(a\)\(5\)](#), if [IC 4-22-2](#) does not require the interpretation to be adopted as a rule; if the change would increase a taxpayer's liability for a listed tax.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

In addition to the statutory "burden" imposed by IC § 6-8.1-5-1(c), in applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." Indiana Dept. of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

IC § 6-2.5-5-25, like all tax exemption provisions, is strictly construed against exemption from the tax. Tri-States Double Cola Bottling Co. v. Dep't of State Revenue, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999); Mynsberge v. Dep't of State Revenue, 716 N.E.2d 629, 636 (Ind. Tax Ct. 1999).

Therefore, in order for Taxpayer to prevail on the issue, the Taxpayer bears the burden of proving that the assessment is incorrect and that the "strictly construed" exemption should apply to the facts and circumstances surrounding the particular transactions.

The Department's stated position on the issue appears to be clear and consistent. Purchases for the private benefit of any member of a not-for-profit organization are not eligible for exemption and hotel room accommodations – secured for a not-for-profit member – are inherently a "private benefit." Any "benefit" obtained by the sponsoring not-for-profit organization is tangential at best. As stated in Sales Tax Information Bulletin 10, [20100929-IR-045100600NRA](#), "Purchases for the private benefit of any member of the organization or for individuals, such as meals and lodgings, are not eligible for exemption." As explained in Letter of Findings 04-20090967 (April 29, 2010), "[E]ach exempt hotel room rental consists of two steps. The first step is to present a properly completed exemption certificate. The second step is to present payment by the exempt organization or governmental organization and confirm that the exemption certificate is actually being used by the exempt organization listed on the exemption certificate. Both steps are necessary and are immediately verifiable. These steps are verifiable by any retail merchant, including but not limited to hotels." See also Letter of Findings 04-20091028 (April 29, 2010).

Taxpayer's challenge to the imposition of sales tax and Innkeepers' Tax on the sale of hotel accommodations is respectfully denied.

Taxpayer argues that it was not required to collect either sales tax or Innkeepers' Tax when it sold meals to not-for-profit organizations which provided Taxpayer with an exemption certificate. IC § 6-2.5-5-25 provides an exemption from sales tax on transactions involving tangible personal property or service "if the person acquiring the property or service... (2) primarily uses the property or service to carry on or to raise money to carry on its not-for-profit purpose[.]"

[45 IAC 2.2-5-55\(b\)\(3\)](#) adds that "[t]he article purchased must be used for the same purpose as that for which the organization is being exempted. Purchases for the private benefit of any member of the organization or for any other individual, such as meals or lodging, are not eligible for exemption. Purchases used for social purposes are never exempt." If meals are prepared and served by a qualified nonprofit organization as a fundraising activity, the proceeds of which are used for the purpose for which such organization is granted exemption from sales tax, and such organization does not conduct selling activities of any nature on more than 30 days in a calendar year, such organization is not required to collect sales tax. See Sales Tax Information Bulletin 10 (July 2004) 27 Ind. Reg. 3385; Sales Tax Information Bulletin 10 (June 2008) 20080702 Ind. Reg. 045080515NRA.

Taxpayer has not shown that the meal service further served the purposes of the respective exempt organizations. Because Taxpayer does not fit, nor resemble, the definition of a nonprofit organization, Taxpayer has not overcome the Department's determination that Taxpayer should have collected sales tax and Innkeepers' Tax on the meals allegedly furnished in conjunction with the rental of Taxpayer's banquet rooms.

FINDING

Taxpayer's protest is respectfully denied.

II. Meeting Rooms – Food and Beverage/Gross Retail Tax.

DISCUSSION

Taxpayer states that it can provide additional exemption certificates received from not-for-profit organizations which rented meeting rooms in Taxpayer's hotel. The Department is prepared to agree that the rental of meeting rooms by non-profit organizations is typically exempt under IC § 6-2.5-5-25 because meeting rooms – unlike individual guest rooms – are typically used "to carry on or to raise money to carry on [the organization's] not-for-profit purpose...."

The audit division is requested to review the exemption certificates and – based upon the information provided – make whatever adjustments it determines are warranted.

FINDING

Taxpayer's protest is sustained subject to the result of the supplemental audit.

III. Government Agencies – Gross Retail Tax.

DISCUSSION

Taxpayer maintains that it was not required to collect sales tax on the rental of hotel rooms to federal governmental agencies.

The Department's position on the issue is set out in Sales Tax Information Bulletin 4 (May 2010), 20100526 Ind. Reg. 045100330NRA which states in part:

The United States Constitution prohibits any state from imposing any tax directly on the U.S. government or any of its agencies, unless the Congress consents to being taxed. Thus, much federal purchasing, leasing, and renting of tangible personal property; the use of utilities; meals consumed in restaurants; and other normally taxable goods or services (including accommodations for fewer than 30 days) are exempt from Indiana sales and other transaction-based taxes. However, the fact that the U.S. government may ultimately reimburse an employee who paid the tax does not exempt such a purchase from tax. For example, if an employee of the Internal Revenue Service pays for lodging costs from his own funds, tax should be collected at the time of payment. But if the same employee pays for the lodging with a credit card in the name of and billed directly to the Internal Revenue Service, this is a direct expenditure by the U.S. government. Therefore, this is exempt from the sales tax. A vendor is not required to collect sales tax on sales made directly to the U.S. government if the exemption can be verified by documenting the facts and circumstances of the transaction. (Emphasis added).

Taxpayer states that it can now provide information which will allow the Department to verify those transactions which occurred between itself and the U.S. Government. To that end, Taxpayer has provided credit card receipts which purportedly evidence transactions between itself and the U.S. Government.

Under IC § 6-8.1-5-1(c), Taxpayer has met its burden of establishing that it conducted transactions directly with the U.S. Government and that Sales Tax Information Bulletin 4 (May 2010) provides sufficient guidance which would enable the Department to differentiate between those transactions which were paid for with a credit card billed directly to the U.S. Government. The audit division is requested to review the credit card receipts, determine which receipts evidence a transaction with the federal government, and to make whatever adjustments it deems appropriate.

FINDING

Taxpayer's protest is sustained subject to the results of the supplemental audit review.

IV. Additional Room Charges – Innkeepers' Tax/Gross Retail Tax.

DISCUSSION

Taxpayer states that it was not required to collect sales or Innkeepers' tax when it rented its customers movies, refrigerators, and rollaway beds. As stated in the audit report, "During the audit period, [Taxpayer] provided lodging for its hotel guests for considerations. When renting a hotel room the customer would be given an opportunity to rent rollaway beds, refrigerators and movies. The charges for these items were billed separately from the original room charge; however, these charges are still considered to be a part of the total gross receipts from furnishing an accommodation." (Emphasis added). In addition, the audit found that Taxpayer "would also, allow hotel guests to make long distance telephone charges from the guest rooms." As such the audit concluded that even though the phone charges were listed separately from other customer charges, the long distance charges "are still considered to be a part of the total gross receipts from furnishing an accommodation."

In addition, Taxpayer maintains that it was not required to collect either sales tax or County Innkeeper Tax when it charged its customers for phone calls.

IC § 6-2.5-4-4 provides:

- (a) A person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations, such as booths, display spaces, banquet facilities, and cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person:
 - (1) if those rooms, lodgings, or accommodations are rented or furnished for periods of less than thirty (30) days; and
 - (2) if the rooms, lodgings, and accommodations are located in a hotel, motel, inn, tourist camp, tourist cabin, gymnasium, hall, coliseum, or other place, where rooms, lodgings, or accommodations are regularly furnished for consideration.

- (b) Each rental or furnishing by a retail merchant under subsection (a) is a separate unitary transaction regardless of whether consideration is paid to an independent contractor or directly to the retail merchant.

IC § 6-2.5-9-3 sets out the responsibilities of a retail merchant:

An individual who: (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and (2) has a duty to remit state gross retail or use taxes (as described in [IC 6-2.5-3-2](#)) to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

In addition, [45 IAC 2.2-4-8](#) states:

- (a) For the purpose of the state gross retail tax and use tax: Every person engaged in the business of renting or furnishing for periods of less than thirty (30) days any accommodation including booths, display spaces and banquet facilities, in any place where accommodations are regularly furnished for a consideration is a retail merchant making retail transactions in respect thereto and the gross income received therefrom shall constitute gross retail income from retail unitary transactions.
- (b) In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for a period of thirty (30) days or more is not subject to the gross retail tax.
- (c) There is no exemption for purchases made by persons who are engaged in renting or furnishing accommodations. Such persons are deemed to purchase or otherwise acquire tangible personal property for use or consumption in the regular course of their business.
- (d) The renting or furnishing of an accommodation for less than thirty (30) days constitutes a retail merchant making a retail transaction. Every person so engaged must collect the gross retail tax on the gross receipts from such transactions. The tax is borne by the person or organization who uses the accommodation.
- (e) The tax is imposed on the gross receipts from "furnishing" an accommodation. The gross receipts subject to tax include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.

(Emphasis added).

The Department refers to the second sentence of [45 IAC 2.2-4-8\(e\)](#), which states, "[t]he gross receipts subject to tax include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation." (Emphasis added). The provision of movies, telephones, refrigerators, and rollaway beds clearly falls within the definition of services which are regularly provided in furnishing the accommodation of a hotel room. Taxpayer suggests that it paid tax on these items when they were first acquired from third-party vendors and that Taxpayer should not be expected to collect a second tier of taxes on those items; in effect, Taxpayer believes it should benefit from a "pass-through" exemption from sales tax. The Department refers to *Greensburg Motel Associates, LP v. Indiana Dep't of State Revenue*, 629 N.E.2d 1302 (Ind. Tax Ct. 1994), in which the Indiana Tax Court discussed a motel operator's claim that consumable items, non-consumable items, and utilities were exempt from sales tax under the resale exemption. Specifically, the *Greensburg Motel Associates* court stated:

In *Indiana Bell Telephone Co. v. Indiana Department of State Revenue*, 627 N.E.2d 1386 (Ind. Tax Ct. 1994), the court, quoting *USAir v. Indiana Department of State Revenue*, 542 N.E.2d 1033 (Ind. Tax Ct. 1989), aff'd

582 N.E.2d 777 (Ind. Tax Ct. 1992), stated "[t]o subdivide the cost of [an airline] ticket into percentages to cover the various services rendered by the airline... strain[s] the meaning of the term 'resale.' When a passenger buys a ticket he buys many services." 627 N.E.2d at 1389. Likewise, when a guest rents a room from Lees Inns, the guest buys the benefits of many services, including consumable items, non-consumable items, and utilities. Accordingly, it is an artificial conclusion to divide the cost of Lees Inns' room rental into resales and leases.

Id. at 1305.

While the court in that case discussed the resale exemption, clearly the Greensburg Motel Associates court considers a room rental to encompass all services to be included in the transaction between the hotel operator and the guest. In the instant case, the type of services regularly provided in furnishing accommodations included movies, refrigerators, beds, and long distance charges and are, therefore, subject to sales tax. The individual guests purchases these services from Taxpayer and not from third-party vendors, as described and decided by Greensburg Motel Associates. Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c) and the Department concludes that the rental of movies, refrigerators, and beds are "services which are regularly provided in furnishing the accommodation." [45 IAC 2.2-4-8\(e\)](#). Clearly, Taxpayer's customers could opt out of renting movies, refrigerators, beds, or making long distance phone calls.

The Department must decline the opportunity to set out a test which would hinge on the question of whether or not the optional cost is strictly "essential" to the underlying transaction.

The tax is imposed on the gross receipts received by the retail merchant and includes the amount that represents consideration for the rendition of those services which are essential to the furnishing of the accommodation and those services which are regularly provided in furnishing the room or accommodation. Such amounts are subject to tax even if they are separately itemized on the statement or invoice. This includes telephone access charges. Sales Tax Information Bulletin 41 (September 2010) ([20100929-IR-045100600NRA](#)) (Emphasis added).

FINDING

Taxpayer's protest is respectfully denied.

V. Catered Meals – Food and Beverage Tax.

DISCUSSION

Taxpayer states that it was not subject to Food and Beverage Tax on the price paid by not-for-profit organizations for catered meals.

IC § 6-9-12 imposes a tax designated as the "Marion County Food and Beverage Tax." The tax is imposed on any "transaction in which food or beverage is furnished, prepared, or served: (1) for consumption at a location, or on equipment, provided by a retail merchant; (2) in a county in which a consolidated first class city is located; and (3) by a retail merchant for a consideration." IC § 6-9-12-3(a). The same exemptions that are allowed to retail merchants under IC § 6-2.5 are allowed for taxpayers that are subject to Indiana's county food and beverage tax. IC § 6-9-12-4.

The audit found that Taxpayer "would cater various events, including luncheons and dinner functions for local nonprofit organizations and corporations.... When the Taxpayer billed its customers, food and beverage tax was not charged to (and/or collected from) nonprofit organizations."

Taxpayer maintains that it was not required to collect the Food and Beverage Tax because it obtained valid exemption certificates. For purposes of this Letter of Findings, the Department agrees with Taxpayer's assertion that, "Since the Marion County Food & Beverage Tax incorporates the provisions of 6-2.5 relating to rights, duties, liabilities, procedures, penalties, definitions, exemptions, and administration, to the extent that any provision of accommodations in Marion County are subject to sales tax, then those transactions are also subject to food and beverage tax." However, the Department is unable to agree that the purchases are exempt pursuant to IC § 6-2.5-5-25 because providing catered meals to the organizations constituents and/or guests does not – on its face – advance the not-for-profit's purpose. The Department's position on this is clear. Sales Tax Information Bulletin 10 (June 2008) provides as follows:

For a purchase by a nonprofit organization to qualify for exemption, the article purchased must be used for the same purpose as that for which the organization is being exempted. Purchases for the private benefit of any member of the organization or for individuals, such as meals and lodgings, are not eligible for exemption. (Emphasis added).

If there were any doubt as to the question, the Department's General Sales Tax Exemption Certificate states that the certificate "[m]ay not be used for personal hotel rooms and meals."

FINDING

Taxpayer's protest is respectfully denied.

VI. Miscellaneous Income – Gross Retail/Food and Beverage Tax.

DISCUSSION

Taxpayer maintains that the audit incorrectly included approximately \$15,731 as subject to sales tax. Taxpayer states that this amount constituted a credit properly taken for timely filing its sales tax returns for January through March 2008, April through December 2008, and January through December 2009.

IC § 6-2.5-6-10 permits retail merchants to retain a "collection allowance" intended to compensate the merchants for collecting and timely remitting the state gross retail tax...." This amount of compensation is not subject to the gross retail tax because there is no "retail transaction" underlying the allowance. See [IC 6-2.5-2-1](#). The allowance is simply a compensatory amount permitted the retail merchant. The audit division is requested to review the original report and – as warranted – adjust the original assessment removing the collection allowance amounts.

Taxpayer also maintains that the audit included approximately \$22,326 as subject to Food and Beverage Tax. Taxpayer explains that the \$22,326 was obtained January through March 2008, April through December 2008, and January through December 2009. Taxpayer explains that "these amounts represent the difference between the food and beverage gratuity collected from [Taxpayer's] customers and the amount paid out to employees."

As noted above in Part V, the same exemptions that are allowed to retail merchants under IC § 6-2.5 are allowed for taxpayers that are subject to Indiana's county food and beverage tax. IC § 6-9-12-4. "Gratuities are not taxable when they result from an unsolicited, affirmative action on the part of the customer to reward good service." Sales Tax Information Bulletin 7 (October 2010) (20101124 Ind. Reg. 045100710NRA). The Department is unable to agree that, under IC § 6-8.1-5-1(c), Taxpayer has met its burden of demonstrating that the amount at issue represents an exempt gratuity. There is little to indicate that the amount represents anything more than an additional compensation Taxpayer receives for serving its customers food and beverages. There is little to indicate that Taxpayer's customers paid Taxpayer this amount as the result of an "affirmative action... to reward good service."

FINDING

Taxpayer's protest is denied in part and sustained in part.

SUMMARY

Taxpayer's challenge to the imposition of tax on the rental of meeting rooms to not-for-profit organizations is sustained subject to the results of the supplemental audit. Taxpayer's protest challenging the imposition of tax on transactions paid for directly by the U.S. Government is sustained subject to the results of the supplemental audit. Taxpayer's protest challenging the imposition of gross retail tax on amounts received as a "collection allowance" is sustained. In all other respects, Taxpayer's protest is denied.

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